No. 14076.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL VIDALES, Also Known as ANGEL VIDALES-GALVAN,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of the Facts.

Plaintiff and appellant, Angel Vidales, was born in Anaheim, California, on July 11, 1922, of parents who were citizens of Mexico. He was taken to Mexico when he was a child of about three in 1925, and remained in Mexico until January, 1946, when he returned to the United States.

He remained in the United States for about two years and then went back to Mexico on a visit, but when he tried to return to the United States he was excluded after a hearing by the Board of Special Inquiry for the alleged reason that he had expatriated himself for having remained outside of the United States in time of war for

the purpose of evading or avoiding training and service in the land or naval forces of the United States.

Thereafter he entered the United States and brought this action to determine his status as an American citizen. He denies having committed any act of expatriation.

The question in this case is whether or not the appellant has expatriated himself by evading training or service in the military forces of the United States. In this regard it is contended by appellant that he did not attempt to evade military training or service in the armed forces of the United States and that he was ignorant of any obligation to the United States until he had left his place of residence in Mexico.

The judgment of the court was to the effect that the plaintiff had expatriated himself by having wilfully evaded service in the miltary forces of the United States.

Appellant contends: (1) that said judgment is not supported by the evidence; (2) that the defendant had the burden of proof of showing that plaintiff had performed an act of expatriation and that defendant failed to meet this burden of proof.

Another question involved herein is whether it was proper for the court to receive in evidence the Transcript of the proceedings of the Board of Special Inquiry [Deft. Ex. A], it having been offered for identification only, and in this connection it is urged that in so doing the trial court committed error as a matter of law.

Appellant also raises the issue of the constitutionality of *any* law which would deprive a *native* born American citizen of his United States citizenship other than by voluntary renunciation

The issues in this case were raised by the petition and answer to the petition, plaintiff alleging that he was a citizen of the United States by birth, and that the defendants debarred him and excluded him from entering the United States. The answer admitted that plaintiff was born in the United States but denied that plaintiff was a citizen of the United States, upon the ground that plaintiff had expatriated himself and lost his United States nationality by remaining outside of the United States for the purpose of evading or avoiding training and service in the military forces of the United States during the time of war.

The findings of the court were to the effect that plaintiff was born in the United States and that plaintiff remained outside of the United States to evade or avoid training or service in the armed forces of the United States in time of war.

The conclusions of law were to the effect that plaintiff was born a citizen of the United States, but, having remained outside of the United States in time of war for the purpose of evading or avoiding training and service in the military forces of the United States, has expatriated himself under Section 401(j) of the Nationality Act of 1940 (8 U. S. C. 801(j)), and thereby lost his United States citizenship.

The plaintitff filed written objections to the findings of fact and conclusions of law, particularly that portion of the findings where the court found that the plaintiff had expatriated himself and particularly that portion of the conclusion of law wherein the court concluded that the plaintiff had lost his United States citizenship by expatriation.

Statement of the Pleadings.

1. The pleadings in this case consist of (1) petition filed by plaintiff [Tr. p. 3]; and (2) Answer filed by defendant [Tr. p. 5].

The jurisdiction of the United States District Court is derived from Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903).

Specfication of Errors.

1. The Court erred in adjudging that the appellant is not a national or citizen of the United States.

2. The Court erred in receiving in evidence defendant's Exhibit "A" despite an understanding that Exhibit "A" was offered in evidence for identification only and only as to a portion thereof.

3. The Court erred in making Finding No. V to the effect "That the plaintiff knew almost all of his life that he was a citizen of the United States, and that for more than fifteen years it was his intention to come to the United States."

4. The Court erred in making Finding No. VI to the effect "That the plaintiff knew that the United States was at war and that he had an obligation during the years 1942 to 1945, inclusive, to offer his services in the armed forces of the country, he having become twenty-one years of age in 1943."

5. The Court erred in making Finding No. VII to the effect "That the plaintiff remained outside the jurisdiction of the United States after September 27, 1944, to evade or avoid training and service in the armed forces of the United States, in time of war or during a period declared by the President to be a period of national emergency."

Summary of Argument.

Appellant was taken to Mexico at the age of three and resided on an isolated ranch until he departed for the United States; received no schooling; was ignorant of world affairs, politics or the nature of the obligations of a citizen of the United States until he reached the United States. His failure to register for military services in the United States was not wilful or intentional or voluntary, and this absence from the United States was not for the purpose of evading service in the military forces of the United States.

The government has the burden of proof to establish its case by clear and convincing evidence and has failed to do so.

An act of expatriation must be voluntary, and the evidence indicates that the appellant did not voluntarily evade his obligations as a citizen of the United States.

The findings and judgment of the Court to the effect that appellant had expatriated himself, thereby forfeiting his citizenship, are not supported by the evidence.

The Court erred in admitting Defendant's Exhibit "A," (consisting of the Transcript of the testimony of the Board of Special Inquiry held at Calexico, California) in view of the understanding that it was only offered for *identification* and solely for the purpose of impeachment with respect to certain portions thereof [Tr. pp. 50-51].

Section 401(j) of the Nationality Act of 1940 (8 U. S. C. A., 801(j), is unconstitutional.

ARGUMENT—AS TO FACTS.

Plaintiff and appellant, Angel Vidales, was born in Anaheim, California, on July 11, 1922, of parents who were citizens of Mexico. He was taken to Mexico in 1925, and remained in Mexico until January, 1946, when he returned to the United States.

Plaintiff was taken to Mexico by his parents when about three years old and went to live on ranches in the "Sierras" and resided there with his parents until coming to the United States the first time [Tr. of Rec. p. 22].

These ranches were between 50 and 70 miles from the nearest town or village [Tr. of Rec. pp. 22-23].

Plaintiff was engaging in planting corn. He did not attend school, but when he grew up he was taught to write by his mother [Tr. of Rec. p. 23].

Plaintiff occasionally went to the nearest village on horseback, usually about every fourth or fifth month, accompanied by his father, to obtain provisions. It was about an eight hour ride to the village [Tr. of Rec. pp. 23-24].

He learned that he was born in the United States when he was about 12 or 14 years of age through conversations between his parents [Tr. of Rec. p. 24].

He did not know that the United States was at war while living on the ranch [Tr. of Rec. p. 24], but learned of it in town in 1945 [Tr. of Rec. p. 31].

When he became of age he got the idea of wanting to come to the United States, as he heard people talk about coming to the United States and wanted to do likewise, but he didn't have the means of making the trip [Tr. of Rec. pp. 24-25].

Eventually he got the money to go to the border from his father [Tr. of Rec. pp. 25-26].

As he had little or no money of his own [Tr. of Rec. p. 26].

He set out to the United States on horseback to a nearby town accompanied by his father. At Valpariso Valle, Zacatecas he parted from his father and took a bus to another town named Frensillo where he had a cousin with whom he stayed for two weeks. From Frensillo he took another bus to Canitas where he boarded the train and went by train from Canitas to Juarez. In Juarez he went to the home of a friend of his father, whose address had been given to him by his father, and disclosed to this friend his intentions of coming to the United States. This friend directed him to the customs house at the border where he presented his baptismal certificate which was the only document he had in his possession [Tr. of Rec. pp. 26-27].

He was then directed to the American Consulate where he obtained a certificate to cross into the United States [Tr. of Rec. p. 27].

He crossed into the United States in 1946 [Tr. of Rec. pp. 27-28].

After crossing into the United States *he registered for military service* [Tr. of Rec. p. 28].

He learned about the law requiring his registering for military service from a cousin whom he met in the United States [Tr. of Rec. p. 28].

He did not know about any of the laws of the United States prior to his coming into the United States [Tr. of Rec. p. 28].

After coming to the United States in 1946 he remained here for approximately two years before crossing to Mexico voluntarily, and when he tried to return he was not allowed to do so [Tr. of Rec. pp. 28-29].

The record shows that the plaintiff was excluded from the United States when he attempted to re-cross [Tr. of Rec. p. 29].

(In Transcript of Record, page 43, plaintiff explains that whenever he said he knew about the war he was referring to 1945 when he was on his way to the United States. In Transcript of Record, pages 55 and 56, plaintiff explains to the court that he did not know the meaning of the question about his obligation to the United States and also that his parents did not know about the war.)

ARGUMENT—AS TO LAW.

Burden of Proof.

Plaintiff make a *prima facie* case by alleging and proving his birth in the United States, and then *the government has the burden of showing that plaintiff has performed an act of expatriation.*

Pandolfo v. Acheson, 202 F. 2d 38 (2d Cir., 1953).

Act of Expatriation Must Be Voluntary.

In a proceeding to establish expatriation of a native-born citizen, the government must establish its case by clear, unequivocal and convincing evidence. Expatriation of a native-born citizen can be accomplished only by a voluntary act which indicates relinquishment of his American nationality in favor of allegiance to some foreign state.

There must be more than inference, hypothesis or surmise before a native-born citizen can be stripped of his citizenship, notwithstanding that the government has difficulty in obtaining the necessary proof in cases of this kind.

Acheson v. Maenza, 202 F. 2d 453 (D. C. 1953).

In this case the plaintiff voted because of a fear of displeasing the occupation authorities who might interfere with her plans to return to the United States, which resulted in an involuntary act on her part and which did not bring about expatriation.

Kasumi Nakashima v. Acheson, 98 Fed. Supp. 11, (D. C. S. D. Calif., D. C. June 22, 1951).

On the evidence in the case, the Court found that both the service in the Japanese Army and the acceptance of the teaching position were involuntary. Consequently, no expatriation ensued by reason of those acts.

Noboru Kanbara v. Acheson, 103 Fed Supp. 565, (D. C. S. D. Calif. Cent. Div., Jan. 30, 1952).

Plaintiff returned to Canada in order that she might take care of her aged and infirm mother, who needed constant personal care and attention. The Department of State having certified that she had lost her United States citizenship under Section 404(b) of the Nationality Act of 1940, by reason of residence abroad for three years in the country of her birth, a Section 503 action was brought.

The Court gave judgment for the plaintiff, holding: (1) Plaintiff's intention was not the vital test; (2) However, the true test was whether her stay in Canada was

a voluntary act; (3) A "voluntary act" was one which proceeded from one's "own choice or full consent unimpelled by another's influence"; further, that "the means of exercising duress is not limited to guns, clubs, or physical threats; the fear of loss of access to one's country, like the fear of loss of a loved one, can be more coercive than the fear of physical violence (citing *Kasumi Nakashima v. Acheson,* 98 Fed. Supp. 11); (4) The facts which impelled the plaintiff in this case to stay in Canada from time to time indicated that such absence from the United States was involuntary.

Rychman v. Acheson, 106 Fed. Supp. 739, (D. C. S. D. Tex. Houston Div., March 27 1952).

Error to Admit Exhibit "A".

On appeal, the Circuit Court in reversing, stated that the declaratory judgment action is an independent action or a review *de novo* of the administrative proceeding. Therefore, the copy of testimony given by the alleged uncle at the administrative hearing was not admissible as evidence before the District Court over objection.

Wong Wing Foo v. McGrath, 196 F. 2d 120 (9th Cir., 1952).

Clear and Convincing Evidence Required.

The Court gave judgment for the plaintiff, holding: (1) The evidence offered to sustain a claim that plaintiff had voted in Mexico was legally insufficient; (2) It is common knowledge that persons of Mexican extraction, who are illiterate, are always agreeable with those in authority, and generally feel that it is impolite to disagree; (3) The evidence to establish expatriation must be clear,

certain and overwhelming, which is not the degree of evidence offered in this case by the defendant.

Nieto v. McGrath, 108 Fed. Supp. 150, (D. C. S. D. Texas, Laredo Div., March 31, 1951).

(Note: In a later case the same Judge followed the *Nieto* case above reported, in holding that expatriation had not resulted under similar circumstances. *Martinez v. McGrath,* 108 Fed. Supp. 155, (D. C. S. D. Texas, Brownsville Div., Oct. 29, 1952).)

Court finds evidence of citizenship contrary to ruling of Board of Special Inquiry. A Board of Special Inquiry ruled that the person before it was not a United States citizen; on appeal, the ruling was sustained by the Commissioner and the Board of Immigration Appeals. Thereafter a declaratory judgment action was brought to obtain a judicial determination of United States citizenship.

The Court held: (1) Plaintiff's testimony before the Board of Special Inquiry was so confused and contradictory that the action of the Board was readily understandable; (2) Where the testimony of a witness having great interest in the outcome of the proceedings is not only contradictory, but in part clearly wrong, the trier of the facts very naturally cannot give the weight to his testimony which otherwise it would require; (3) However, other evidence adduced at the trial, such as proof that over a long period the father made substantial remittances to the plaintiff, and the lack of any evidence to the contrary, led the Court to feel that plaintiff was the son of an American citizen, and, as such, a United States citizen. Judgment for plaintiff.

Eng Bok Chum v. Brownell, 111 Fed. Supp. 454, (D. C., D. C., April 22 1953).

The appellant urges that Section 401(j) of the Nationality Act of 1940 is unconstitutional upon the same reasoning that was used in the cases hereinafter cited. Section 401(c) and (e) of the Nationality Act of 1940 was held unconstitutional in the following cases:

Kiyokuro Okimura v. Acheson; and

Hisao Murata v Acheson, 111 Fed. Supp. 303 and 306, (D. C. Hawaii, April 1, 1953).

Wherefore it is prayed that judgment be reversed.

Respectfully submitted,

J. Widoff,

Attorney for Appellant.